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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 541

PIASECKI AIRCRAFT CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	3
A. The Facts	3
B. Opinions Below	7
(1) Decision of the National Labor Relations Board	7
(2) Decision of the Court of Appeals for the Third Circuit	8
Reasons for Granting the Writ	10
1. The Decision Below Conflicts With the Rulings of Other Circuit Courts of Appeals and Seriously Undermines the Act's Objective to Protect the Employer's Hiring Function From Union Interference	10
2. The Decision Below Provides an Appropriate Occasion for the Court to Delineate the Standards Qualifying Job Applicants as "Employees" Under the Act, in the Light of Statutory and Decisional Developments Since Its Ruling in Phelps Dodge Corp. v. National Labor Relations Board	12
3. Enforcement of the Employment and Back Pay Provisions of the Order Contravenes Settled Principles and Discourages the Correction of Unfair Labor Practices	13
Conclusion	17
Appendix.	

TABLE OF AUTHORITIES

CASES: Page

American Communications Ass'n v. Doud, 339 U.S. 382 (1950) 16
Coca Cola Bottling Co., 95 NLRB 284 (1951) 15
Joy Togs Inc., 83 NLRB 1024 (1949) 15
Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941) 10, 12
Pullman-Standard Car Manufacturing Co., 76 NLRB 1254 (1948) 15
Radio Officers Union Etc., v. N.L.R.B., 347 U.S. 17 (1954) 11, 14
Red Star Express Lines v. N.L.R.B., 196 F.2d 78 (2d Cir. 1952) 11
Republic Steel Corp. v. N.L.R.B., 311 U.S. 7 (1949) 15
N.L.R.B. v. Anchor Rome Mills, 228 F.2d 775 (5th Cir. 1956) 10, 11
N.L.R.B. v. Childs Co., 195 F.2d 617 (2d Cir. 1952) 10
N.L.R.B. v. Crosby Chemicals Inc., 188 F.2d 91 (5th Cir. 1951) 15
N.L.R.B. v. District 30, United Mine Workers, 355 U.S. 453 (1958) 15
N.L.R.B. v. Fainblatt, 306 U.S. 601 (1939) 16
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 16
N.L.R.B. v. F. H. McGraw & Co., 206 F.2d 635 (6th Cir. 1953) 11
N.L.R.B. v. Pennwoven Inc., 194 F.2d 521 (3d Cir. 1952) 10
N.L.R.B. v. Textile Machine Works, Inc., 214 F.2d 929 (3d Cir. 1954) 10, 11
N.L.R.B. v. Whiting Mead Co., 198 F.2d 817 (9th Cir. 1945) 15

STATUTES:

Section 8(a)(1), National Labor Relations Act, 29 U.S.C. § 158(a)(1) 7
Section 8(a)(3), National Labor Relations Act, 29 U.S.C. § 158(a)(3) 3, 7, 8, 14
Section 8(a)(5), National Labor Relations Act, 29 U.S.C. § 158(a)(5) 7, 8
Section 8(b)(2), National Labor Relations Act, 29 U.S.C. § 158(b)(2) 3, 11
Section 10(e), National Labor Relations Act, 29 U.S.C. § 160(e) 3

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the U. S. Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board against petitioner.[1]

OPINIONS BELOW

The opinion below appears at App. 1a to 36a[2] and is

[1] A petition for a writ of certiorari has also been filed in this case by International Union, UAW, AFL-CIO, and its Local 840, also parties to this proceeding. No. 466, October term, 1960.

[2] The following designations to the record are used herein:

"App."—Opinion, Order, and Decree below, comprising pages 1a to 42a of the Appendix to this Petition.
"P"—the portion of the record printed as an appendix to the Briefs filed below by Piasecki Aircraft Corporation.
"B"—the portion of the record printed as an appendix to the Briefs filed below by the National Labor Relations Board.

reported at 280 F. 2d 575. The decision and order of the Board (P. 249a-257a) is recorded at 123 NLRB at 348.

JURISDICTION

The decision of the court below (Hastie, J., dissenting) was entered on June 20, 1960. (App. 1a). On August 26, 1960, the court denied petitioner's petition for rehearing and amended its decision. (App. 35a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The statutes involved are sections 8(a)(3), 8(b)(2), and 10(c) of the National Labor Relations Act, hereafter referred to as the "Act". The pertinent parts of these provisions are as follows:

> "(a) It shall be an unfair labor practice for an employer—
>
> • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." (Section 8(a)(3), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3)).
>
> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (Section 8(b)(2), 61 Stat. 140, 29 U.S.C. § 158(b)(2)).
>
> ". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the

Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . ." (Section 10(c), 49 Stat. 454, as amended, 29 U.S.C. § 160(c)).

QUESTIONS PRESENTED

(1) Whether applicants for employment, whose applications for work are conditioned on their face on reinstatement to former jobs, restoration of seniority rights, and recognition of their union, qualify as "employees" within the meaning of the Act, entitled to protection against an employer's discriminatory refusal to interview them.

(2) In any event, whether an employer's liability to applicants for employment whom it refused to interview in violation of the Act, is tolled by the employer's subsequent good faith and unequivocal invitations to appear for job interviews, which the applicants voluntarily rejected.

(3) Whether an order which requires the employer to offer employment and reimbursement to such applicants, covering periods subsequent to the good faith invitations, is punitive and contrary to the policies of the Act.

STATEMENT OF THE CASE

A. THE FACTS

This summary is based on the findings of fact detailed in the decision below.

(1) Petitioner is a Pennsylvania corporation with its main plant at the Philadelphia International Airport, Philadelphia, Pennsylvania. It is engaged in the develop-

ment and production of aviation parts and equipment. On October 24, 1956, petitioner entered into an agreement with the Bellanca Aircraft Corporation to purchase Bellanca's plant located in New Castle, Delaware, about thirty miles from petitioner's main plant. (App. 2a). The agreement provided for the sale to petitioner of the Bellanca plant on November 23, 1956. (App. 3a).

(2) Bellanca employed about 140 maintenance and production workers and seven clerical workers. (App. 3a). These employees were unionized and represented by Local 840, International Union, UAW-AFL-CIO, under a collective bargaining agreement which the Union and Bellanca had entered into on June 1, 1955. (App. 2a).

(3) This collective bargaining agreement provided for its termination, upon written notice, in the event of the plant's sale. (App. 3a). In accordance with that provision, Bellanca formally notified the Union on November 1, 1956, that the agreement would be terminated as of the sale date of November 23, 1956. (App. 7a). The Union, however, took the position that the agreement had not been validly terminated by Bellanca. (App. 8a).

(4) On November 5, 1956, the Union requested a meeting with petitioner "for the purpose of collective bargaining as representatives of the employees of Bellanca Corporation, its successors or assigns" (*ibid.*). On November 13, 1956, it addressed another letter to petitioner requesting that it send representatives to a negotiating conference. (App. 9a). The letter stated that Bellanca employees were available for employment with petitioner "as successor to Bellanca Corporation" (B. 405b). It further advised petitioner that "the seniority, conditions of employment and other status and benefits of such employees should not be diminished" (*ibid.*).

(5) In the meantime, on October 30, 1956, petitioner sent each of the Bellanca employees a letter inviting them

to apply for work and enclosing an application for that purpose. About 75 completed applications were received from the Bellanca workers during the period of November 2-16, 1956. (App. 6a). On November 14, 1956, the Union determined to take an active role in the preparation of its members' request for employment with petitioner. (App. 10a). Accordingly, under its direction, 135 of the workers, including those who had previously submitted individual applications, each signed a letter drafted by the Union requesting employment. On November 14, 1956, these requests for employment were forwarded *en masse* to petitioner under a covering letter of the Union. (App. 11a). This letter demanded the

> "recall of Bellanca employees to such jobs in accordance with their seniority as established in the agreement between Bellanca Corporation and the International Union, UAW, and its Local 840, dated June 1, 1955 . . ." (App. 12a).

(6) On November 25, 1956, the Bellanca plant was sold to petitioner. On that date, in accordance with prior notices, the Bellanca workers were discharged. (App. 13a).

(7) On November 25 and 26, 1956, after the mass applications for employment had been received by petitioner, there occurred the challenged conduct which precipitated the present proceedings against petitioner. On November 25, 1956, petitioner scheduled job interviews at the Bellanca plant. Sixty of the Bellanca workers congregated at the plant with their union officers. (App. 13a). Petitioner refused to interview them. (App. 14a, 18a-19a).

(8) On November 26, 1956, the first regular work day following the sale of the Bellanca plant to petitioner, all of the Bellanca workers, under their union leadership, massed in their work clothes at the plant at the regular work time. (App. 14a). A union officer told petitioner's Di-

rector of Labor Relations that the employees were there because "they want their jobs" (*ibid.*). Petitioner did not permit the workers to enter the plant and refused to talk with the union leaders. (App. 15a).

(9) On the following day, November 27, 1956, a union picket line was established at the plant and the union renewed its demands to petitioner for recognition as the exclusive bargaining agent for the workers at the plant. (App. 15a).

(10) On November 30, 1956, petitioner mailed to every one of the former Bellanca workers, a letter urging each of them to come for a job interview to petitioner's office at its main plant at the Philadelphia International Airport. (App. 15). The letter, which is quoted below in its entirety, expressly promised that petitioner would give the workers "consideration for immediate employment" at the New Castle plant (B. 426b):

"Dear Aircrafter:

While we have your application for employment, you have not appeared for an interview. We are conducting interviews at our Philadelphia International Airport plant where you can appear any day between 9:00 A.M. and 4:00 P.M.

We will be glad to give you consideration for immediate employment at New Castle where, as you are aware, certain individuals congregate before the gates of the plant. None of these persons are our employees.

This is an opportunity for you to become a member of Piasecki Aircraft Corporation, which you must be, before anyone can represent you in bargaining regarding wages, hours and other working conditions in our plant.

Our company must continue to employ workers in order to grow and supply jobs and security for our employees.

Those who are employed by us now, will receive our benefits which are enclosed, and their employment will date from the day of hiring.

Let's go!

Sincerely yours,

PIASECKI AIRCRAFT CORPORATION

/s/ FRANKLIN W. MOSER
Franklin W. Moser,
Director of Industrial Relations".

Not a single worker appeared for an interview or submitted any response to this invitation. (App. 20a).

(11) On June 12, 1957, the General Counsel of the National Labor Relations Board issued a complaint against petitioner which charged that petitioner had "discharged" and "refused to reinstate" the Bellanca workers because of their refusal to abandon their rights to bargain collectively, in violation of sections 8(a)(1) and 8(a)(3). It also charged that petitioner had refused to bargain with the union, in violation of section 8(a)(5). (App. 4a).

B. OPINIONS BELOW

(1) Decision of the National Labor Relations Board

In an opinion upholding the intermediate report of the trial examiner, the Board concluded that petitioner committed no violation of section 8(a)(5) by its refusal to bargain with the Union inasmuch as petitioner was not a successor to Bellanca. However, it found that petitioner had discriminatorily refused to interview and hire 133 Bellanca workers on account of their union affiliation, in violation of sections 8(a)(3) and 8(a)(1). To remedy this discrimination, it ordered petitioner to offer employment and reimbursement to these workers for the period beginning November 25, 1956 and continuing after November 30, 1956. (The Board's decision and order and the

intermediate report of the trial examiner are found at P. 249a-257a and 187a-243a, respectively).

(2) Decision of the Court of Appeals for the Third Circuit

In the opinion below, the Court of Appeals for the Third Circuit sustained the Board's conclusions. The Court unanimously ruled that petitioner had not violated the prohibitions of section 8(a)(5). But, with Judge Hastie dissenting, the majority of the panel (Judges Goodrich and Forman) concluded that petitioner stood in violation of section 8(a)(3) by reason of its discrimination against the former Bellanca workers. The Board's order was enforced against petitioner in its entirety. (App. 37a-42a).

The majority opinion held that the workers submitted unconditional applications for new employment which entitled them to relief under the Act. (App. 31a, 36a). It reached this conclusion despite its own findings that the Bellanca workers submitted requests for work *en masse* under union direction, together with a series of demands for reinstatement to former jobs, recognition of the Union, and restoration of the Bellanca collective bargaining agreement. The Court below disposed of these demands in terms of its analysis of the state of mind of the employees. It held that such demands were intended merely to prevent their applications for employment from being interpreted as waivers of any rights which "might inure to them" under the Bellanca collective bargaining agreement. (App. 31a).

In further reliance on the workers' subjective state of mind, the majority rejected petitioner's contention that its liability for reimbursement and employment of the workers was tolled by the unconditional invitations for job interviews, which it extended on November 30, 1956, to each of the workers. The Court made no finding that these invitations were issued in bad faith. It nevertheless discounted them on the ground that they failed "to dispel

the definite conviction firmly fixed that former Union members would not be granted employment" (App. 31a). On the same basis, it disregarded entirely the conceded fact that not a single one of the employees responded to the invitations. (App. 29a, 31a).

Judge Hastie, in his dissent, ruled that any violation of section 8(a)(3) committed by petitioner on November 25 and 26, 1956 was cured by petitioner's subsequent invitations of November 30, 1956. In his view, the invitations accordingly tolled petitioner's liability. As he stated (App. 34a-35a):

> ". . . I disagree with the court's disposition of the matter of refusal to hire because of union affiliation in violation of Section 8(a)(3). Any such violation which may have occurred on November 25th and November 26th was, in my view, cured on November 30th when the employer extended to each of the recent employees of its predecessor an unequivocal invitation to apply and report to its Philadelphia Office for 'consideration for immediate employment at New Castle'.
>
> The complaining employees ignored this invitation. I can find nothing in the record to justify a conclusion that the employer's offer was not genuine or even that it was ignored in that belief. What the employer was insisting, as an officer of the union testified and the trial examiner found, was that hiring be accomplished by direct dealings between the employer and the several applicants rather than through the union as a bargaining agent. The union and its adherents were strenuously resisting this denial of representative status. But this court's disposition of the charge under Section 8(a)(5) establishes that the union was not entitled to be recognized as bargaining agent at that time. In these circumstances no right to reinstatement and back pay survived the employees' rejection of the offer of November 30th."

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Rulings of Other Circuit Courts of Appeals and Seriously Undermines the Act's Objective to Protect the Employer's Hiring Function From Union Interference.

The order enforced in this case has its genesis in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177 (1941). There, the Court held that applicants for employment qualified as "employees" within the meaning of the Act, and as such were protected against an employer's discriminatory refusal to hire them on account of union affiliation.

In applying the *Phelps Dodge* decision, the Courts of Appeals for the Second and Fifth Circuits, as well as other panels of the Third Circuit, imposed an objective test to determine those applicants who qualified as "employees" protected under the Act. These courts unanimously insisted that in order to qualify, the workers must have submitted applications for employment which *on their face* were *clear* and *unequivocal requests for new employment*. On this basis they denied relief to workers whose requests for work were coupled with overt demands for reinstatement to prior jobs and for restoration of seniority rights. See *N.L.R.B.* v. *Anchor Rome Mills, Inc.*, 228 F. 2d 775, 780-781 (5th Cir. 1956); *N.L.R.B.* v. *Childs Co.*, 195 F. 2d 617, 620-621 (2d Cir. 1952); *N.L.R.B.* v. *Textile Machine Works, Inc.*, 214 F. 2d 929 (3d Cir. 1954); *N.L.R.B.* v. *Pennwoven Inc.*, 194 F. 2d 521, 525-526 (3d Cir. 1952).

The decision below clearly contravenes these authorities. The court ignores its own findings which establish that the Bellanca workers' applications for employment were coupled with demands which expressly demanded reinstatement of the workers, restoration of seniority, and recognition of their union. The decision below rests instead on conjectural conclusions regarding the supposed subjective intention of the workers in submitting such demands.

The square conflict with decisions of other circuit courts of appeal is accentuated by the disregard below of the statement of the workers' representative to petitioner's director of labor relations that they had massed at the plant on November 26, 1956, dressed in work clothes, because "*they want*[*ed*] *their jobs*". (App. 13a, emphasis supplied.) Virtually identical language in itself was held to disqualify job applicants from relief in *N.L.R.B.* v. *Anchor Rome Mills, Inc., supra*, 228 F. 2d at 780-781, and *N.L.R.B.* v. *Textile Machine Works, Inc., supra*, 214 F. 2d at 933. As the court noted in the *Textile Machine Works* case, job applicants "must be held to the plain meaning of their words" (*ibid.*).

The decision below does not involve a mere question of fact which has been resolved against the petitioner. It presents an issue of law of vital importance to the Act's administration—namely, the proper standard for determining whether applicants for employment qualify as "employees" protected under the Act. By its abandonment of the objective test recognized by other Courts of Appeals, the decision below adopts an indefinite and muddled criterion which creates uncertainty and confusion in the Act's administration. It undermines one of the basic policies of the Act, namely, to insure that the employer is free to select his employees without union interference.

This policy was incorporated into the Act by the Taft-Hartley amendments, and is designed not only to protect employers' rights, but to afford non-union workers equal opportunities for employment with union members. See Section 8(b)(2), 29 U.S.C. § 158(b)(2); *Radio Officers Union, Etc.* v. *N.L.R.B.*, 347 U.S. 17 (1954); *Red Star Express Lines* v. *N.L.R.B.*, 196 F. 2d 78 (2d Cir. 1952); *N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (6th Cir. 1953).

As the Court stated in *Radio Officers Union, Etc.* v. *N.L.R.B., supra* (347 U.S. at 40):

> ". . . The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

This insulation from union control cannot be maintained in the face of the ruling of the majority below. The decision requires an employer to deal with workers whose applications for employment are closely interwoven with, and inseparable from, demands for union recognition and restoration of a terminated collective bargaining agreement. If the decision below is allowed to stand, it will tend to erode the intended protection of the employer's hiring function against union interference and the Act's equal employment guarantees to non-union workers.

2. The Decision Below Provides an Appropriate Occasion for the Court to Delineate the Standards Qualifying Job Applicants as "Employees" Under the Act, in the Light of Statutory and Decisional Developments Since Its Ruling in Phelps Dodge Corp. v. National Labor Relations Board.

Although the decision in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177 (1941) is nearly twenty years old, this Court has never outlined the standards for determining the qualifications of job applicants for treatment as "employees" within the meaning of the Act. The decision below provides the Court with an appropriate opportunity to consider this question in the light of subsequent application of the *Phelps Dodge* decision by the courts below and the passage of the Taft-Hartley amendments to the Act in 1947.

Specifically, the Court ought to clarify the proper standards for determining when job applicants qualify for relief under the Act and thereby remove the above-noted conflict in the pertinent decisions of the Courts of Appeals. At the same time, this case provides the Court with an appro-

priate occasion to consider the inter-relationship between the original statutory protection of job applicants and the Taft-Hartley amendments designed to protect the employer's hiring function from union interference and to guarantee the rights of non-union workers to equal access to employment.

3. Enforcement of the Employment and Back Pay Provisions of the Order Contravenes Settled Principles and Discourages the Correction of Unfair Labor Practices.

Another vital issue raised by the decision below concerns the enforcement of the order against petitioner despite petitioner's unqualified invitation, to each of the Bellanca workers, urging them to appear at petitioner's main plant for a job interview. See pp. 6-7, *supra*. The decision of the majority does not dispute Judge Hastie's finding that this was an "unequivocal invitation" which by its express terms promised them "consideration for immediate employment" at the New Castle Plant. (p. 9, *supra*, App. 34a).

The majority dismisses the invitation, and the employer's total disregard of it, on the ground that the invitation failed to dissuade them from the belief that petitioner would not actually employ them. (App. 30a, 20a). But this conclusion is beside the point. The critical issue, which the majority wholly failed to consider, was not the employees' state of mind, but *petitioner's state of mind, i.e., its good faith, in sending the invitation to the workers.* There is no finding by the majority that petitioner's invitation of November 30, 1956, was not sent in good faith. And as Judge Hastie stated in dissent (p. 9, *supra*, App. 34a):

> "... I can find nothing in the record to justify a conclusion that the employer's offer was not genuine or even that it was ignored in that belief."

This Court has long recognized that the employer's motivation is of critical importance to the determination of whether an unfair labor practice has been committed in

violation of section 8(a)(3). As the court stated in *Radio Officers Union, Etc.* v. *N.L.R.B.*, 347 U.S. 17, 43 (1954):

> "The relevance of the motivation of the employer . . . has been consistently recognized under both section 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employers'] true purpose is the subject of investigation with full opportunity to show the facts.' In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8(a)(3). For example, a recent report states that 'upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute.
>
> That Congress intended the employer's purpose in discriminating to be controlling is clear . . ."

If the employer's motivation is relevant to the determination of a violation of section 8(a)(3), it clearly follows that it has a similar bearing on the issue of whether an employer has *cured* such a violation by its subsequent conduct. This is implicitly acknowledged by the long line of authorities which hold that an employer's good faith and unequivocal offer to reinstate illegally discharged employees tolls his liability for reinstatement and back pay

under the Act. See e.g. *N.L.R.B.* v. *Crosby Chemicals, Inc.*, 188 F. 2d 91 (5th Cir. 1951); *N.L.R.B.* v. *Whiting Mead Co.*, 198 F. 2d 817 (9th Cir. 1945); *Coca Cola Bottling Co.*, 95 NLRB 284 (1951), *order enforced*, 195 F. 2d 955 (8th Cir. 1952); *Joy Togs Inc.*, 83 NLRB 1024, 1025 (1949); *Pullman-Standard Car Manufacturing Co.*, 76 NLRB 1254, 1256 (1948).

As Judge Hastie recognized in dissent, this principle was clearly controlling here. Regardless of prior events, petitioner's invitation of November 30, 1956, being unchallenged as to its good faith, precludes enforcement of the employment and back pay provisions of the order so far as they relate to any subsequent period of time. The decision of the majority below not only contravenes established authority; it unfairly saddles petitioner with an enormous liability to reimburse 133 workers for back pay accruing from November 25, 1956, although they voluntarily rejected petitioner's good faith invitation, extended only five days later, without the slightest response of any kind from any one of them. In these circumstances, the broad and unqualified order of the Board violates the Court's established condemnation of punitive and oppressive orders under the National Labor Relations Act. See, e.g., *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7, 11-12 (1949); *N.L.R.B.* v. *District 50, United Mine Workers*, 355 U.S. 453, 458 (1958).

As the Court stated in *N.L.R.B.* v. *District 50, United Mine Workers*, *supra*, 355 U.S. at 458:

> ". . . The Board's discretionary authority to fashion remedies to purge unfair labor practices necessarily has a broad reach. N.L.R.B. v. Link Belt Co., 311 U.S. 584, 600. But the power is not limitless; *it is contained by the requirement that the remedy shall be 'appropriate'*, N.L.R.B. v. Bradford Dyeing Asso., 310 U.S. 318, and shall 'be adapted to the situation which calls for redress,' N.L.R.B. v. Mackay Radio & Tel. Co., 304

U.S. 333, 348. *The Board may not apply 'a remedy it has worked out on the basis of its experience; without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.'* N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344." (Emphasis supplied).

Furthermore, enforcement of the order, notwithstanding petitioner's good faith efforts to cure the violation opposes the basic aim of the National Labor Relations Act, namely, to encourage the elimination of labor unrest and strife. See *American Communications Ass'n* v. *Doud*, 339 U.S. 382, 387-388 (1950); *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607 (1939). The decision below signifies that an employer's honest endeavor to remedy an unfair labor practice is an act of futility unless the workers choose to respond to it. If allowed to stand, the decision will clearly discourage employers from undertaking, on their own initiative, to correct prior unfair labor practices and to settle their labor disputes without Government intervention. Hence, the order as enforced below wholly fails to "'effectuate the policies' of the Act" (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939)).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted, and the decision of the majority below should be reversed.

Respectfully submitted,

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